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No. 98-350

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

WILLIAM E. WALKER, M.D.,
Petitioner,
v.
THE STATE OF TEXAS,
Respondent.

On Petition For Writ of Certiorari To The
United States Court of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO WALKER'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Was removal by counter-defendant proper under 28 U.S.C. § 1441(c)?

Did the Court of Appeals view the summary judgment evidence in the light most favorable to the non-movant?

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STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 523
28 U.S.C. § 1331
28 U.S.C. § 1441(a)
28 U.S.C. § 1441(c)

STATEMENT OF THE CASE

Petitioner Dr. William Walker asks this Court to vacate a judgment, affirmed by the Court of Appeals for the Fifth Circuit, dismissing his counterclaims against the individual members of the Board of Regents of the University of Texas System, and the President of the University of Texas Health Science Center at Houston, M. David Low. He challenges the federal court's removal jurisdiction over this case, which was removed by the counter-defendants pursuant to 28 U.S.C. § 1441(c). In the alternative, he challenges the district court and the court of appeals in their evaluation of the summary judgment evidence before them. Because the court of appeals did not err in its opinion and judgment, Respondents respectfully request that this Court deny Walker's petition for writ of *certiorari*.

Dr. Walker was a tenured cardiologist at the University of Texas Health Science Center in Houston (UTHSC). As a condition of his employment, he signed a contract with UTHSC in which he joined the Medical Services, Research, and Development Plan (MSRDP). This plan required him to remit any outside professional fees he earned to UTHSC, which included appearance fees for court appearances, depositions, and other legal consultations. Walker earned significant fees while employed at UTHSC, but he failed to remit any to the university. When UTHSC learned of his and other faculty members' non-compliance with the MSRDP, it engaged in a survey of the faculty's outside earnings. Several faculty were found by UTHSC to be in non-compliance and UTHSC entered into negotiations with them to recover the funds. All faculty entered into sizeable settlements with the University except Walker. Walker did offer to remit approximately 5% of the fees UTHSC had estimated he owed, but he refused to provide the University with an accounting of his outside earnings. With no accounting verifying his earnings, the University rejected his offer and started termination proceedings. A UTHSC hearing tribunal found that Walker had

violated the terms of the MSRDP, but that several faculty had done so, and that there was some confusion about its terms, and thus termination was improper. UTHSC rejected this recommendation and presented Walker's termination to a formal meeting of the University of Texas Board of Regents. After a hearing that included testimony from both the UTHSC and Walker, the regents voted to terminate his employment. See Memorandum and Order of the District Court, State of Texas' Petition for Writ of Certiorari, Appendix at A2-A3 and A27-31.

Prior to the University's informal actions to recover the MSRDP funds from Walker, he filed for bankruptcy relief under Chapter 7. It is undisputed that he never listed the University as a creditor, and the University never filed a proof of claim.

The State of Texas, by and through the University of Texas System Board of Regents in their official capacities and UTHSC, filed an original petition in Harris County, Texas district court on February 8, 1995. This petition sought an accounting of funds the University believed Walker converted to his own use, in breach of his employment contract. On August 10, 1995, Walker filed an "Original Counter Claim and Third-Party Claim" against the Board of Regents in both their official and individual capacities, and UTHSC President M. David Low in both his individual and official capacities.[1] Walker's claims related to his allegations that his constitutional right to due process was violated by the named

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[1]Walker labeled President Low as the only third-party defendant in his Original Counter Claim and Third-Party Claim, and labeled the Board of Regents in their official and individual capacities as counter-defendants. The members of the Board of Regents in their individual capacities have no authority to be and were not parties to the original action for conversion and breach of contract. The Original Petition identified the plaintiff as: "Plaintiff is the State of Texas acting through its agency the Board of Regents of the University of Texas System, established pursuant to Tex. Educ. Code § 65.11, and charged with the management of the University of Texas Health Science Center at Houston." Original Petition at ¶ 2.

parties when they terminated him from his tenured faculty position. On September 25, 1995, the Counter-Defendants UTHSC and the Board of Regents, in their official capacities moved the state court to sever the original action from Walker's Counterclaims and third-party claims.[2] Those motions were never ruled on by the Harris County district court before the removal calendar elapsed. On September 29, 1995, this action was timely removed pursuant to 28 U.S.C. § 1441(a), later amended to § 1441(c).[3]

On April 30, 1996, UTHSC, the Board of Regents, and President Low filed a motion for partial summary judgment for those claims brought against them by Walker. Approximately a month later Walker moved for summary judgment on the conversion and breach of contract disputes, claiming any monies owed had been discharged in bankruptcy. The State of Texas, through UTHSC, filed a response to Walker's motion for summary judgment, arguing that the interests were non-dischargeable under 11 U.S.C. § 523. On December 24, 1996, the district granted in part, and denied in part, the pending motions for summary

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[2]On the same day the third-party defendants (President Low in both capacities and the Board of Regents in their individual capacities) moved to strike Walker's third-party claims as barred by the state district court's scheduling order.

[3]The parties filed their Rule 26(f) Joint Report with the district court on March 18, 1996. In this Joint Report the UTHSC, the Board of Regents, and President Low all acknowledged that they had erred in their allegation of removal jurisdiction, and indicated that they had corrected this allegation by, pursuant to 28 U.S.C. § 1653, substituting 28 U.S.C. § 1441(c) for the original § 1441(a) basis of jurisdiction. See *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830-32, 109 S.Ct. 2218, 2222 (1989). Their motion for leave to file an amended notice of removal, alleging 28 U.S.C. § 1441(c) as the basis for jurisdiction, was granted by the district court on March 29, 1996. In their Rule 26(f) Joint Report, Walker contested § 1441(c) jurisdiction, and indicated he would file a motion to remand. He did not.

part, and denied in part, the pending motions for summary judgment. The court dismissed several claims against UTHSC and the regents and President Low in their official capacities pursuant to the Eleventh Amendment, and granted summary judgment on all constitutional claims against the regents and President Low in their individual capacities based on qualified immunity. The court also granted Walker's motion for summary judgment on the conversion claim, finding those interests had been discharged in an earlier bankruptcy proceeding. Final judgment was entered on December 30, 1996.

On January 29, 1997, UTHSC and Walker filed appeals. The University appealed the district court's finding on the discharge in bankruptcy, while Walker appealed the dismissal of his due process and equal protection claims pursuant to qualified immunity. The Fifth Circuit affirmed the district court's judgment on the constitutional claims, finding that the summary judgment evidence before it amply demonstrated that the officials exercised professional judgment, and that it was objectively reasonable for them to have acted as they did. The Fifth Circuit reversed and remanded the discharge in bankruptcy issue, finding that there were disputed questions of material fact precluding summary judgment. In reaching that issue, the court of appeals found that the Eleventh Amendment did not bar the bankruptcy court from having discharged interests of the state.[4]

The central question raised by Walker in his Petition is whether the counter-defendants below could remove the federal

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[4]The State of Texas has petitioned for writ of *certiorari* on this issue.

claims present in Walker's counter-claims petition.[5] The Fifth Circuit was correct in permitting removal by non-original-plaintiff counter-defendant President Low. Section 1441 (c) does not preclude such removals. Earlier versions of this provision which limited removal to the "defendant or defendants" were amended by Congress to delete that language. The counter-claims on which removal was based meet the statutory requirements. Although the court of appeals did not decide the issue, removal would have been proper by the non-original-plaintiff counter-defendant regents in their individual capacities as well. In fact, respondents can find no authority for the argument that an original-plaintiff counter-defendant is precluded from removing a claim pursuant to 28 U.S.C. § 1441(c) that is within the original jurisdiction of the federal court.

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[5]Although Congress provided for the expedited, 30 day consideration of procedural defects in removal, 28 U.S.C. § 1447(c), subject matter jurisdiction can be raised at any time. *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, _, 117 S.Ct. 467, 474-74 (1996)(citing *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 18, 71 S.Ct. 534, 542 (1951). Walker never filed a motion to remand, instead waiting until the case was on appeal to object to the removal to federal court.

> Longstanding decisions of this Court make clear . . . that where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court.

Caterpillar, Inc. v. Lewis, 519 U.S. 61, _, 117 S.Ct. 467, 474-75 (1996)(quoting *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 702, 92 S.Ct. 1344, 1347 (1972)). However, neither *Caterpillar* nor *Grubbs* addressed the situation before this Court: where original jurisdiction only arose in the defendant's counter-claims. Nonetheless, Walker cannot dispute that the district court would have had original jurisdiction had his claims been filed in federal court. Moreover, all the policy considerations this Court found "overwhelming" in *Caterpillar*, "considerations of finality, efficiency, and economy", are present in this action. 519 U.S. at _, 117 S.Ct. at 476. Walker has waived his complaints about removal.

Walker's argument is that only an original plaintiff can "join" claims, and that only an original defendant can remove an action. This argument does not withstand scrutiny. There is no basis to force such a constricted view of "joinder" on the language of the statute. Walker's counterclaims raise claims under the original jurisdiction of the federal court. Respondents can locate no basis in either Article III or § 1441(c) that precludes the federal district court from exercising jurisdiction over this case. Moreover, liberal joinder rules and public policy promoting the efficient litigation of multiple and related claims support a less artificial interpretation of the statute.

ARGUMENTS FOR DENYING THE PETITION

I. REMOVAL BY COUNTER-DEFENDANT LOW WAS PROPER UNDER 28 U.S.C. § 1441(C).

As a preliminary matter, the nature of the parties should be clarified. Walker labeled his petition as comprising counterclaims and third-party claims, and this label has remained in the pleadings of all parties, creating some confusion. None of Walker's claims seek indemnification or to transfer his liability for conversion to another party. Instead, Walker seeks remedies for his termination, both from the original plaintiffs as well as new parties. Although the issue has not been briefed, it seems unlikely that the claims against the university and the regents in their official capacities are compulsory counterclaims, and thus those claims were brought in as permissive counterclaims pursuant to Tex.R.Civ.P. 97(b). His claims against the regents in their individual capacities and President Low in both capacities, since they are new parties, must have been brought in pursuant to Tex.R.Civ.P. 97(f), the state counterpart to FED.R.CIV.P. 13(h).

The regents in their individual capacities were not parties to the original action in state court. In their official capacities, the regents embody the state office they hold. "[T]he real party in interest in an official-capacity suit is the governmental entity and not the named official . . . ." *Hafer v. Melo*, 502 U.S. 21, 25, 112 S.Ct. 358, 361 (1991); *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099, 3105 (1985). The distinction is more than a "mere pleading device". *Hafer*, 502 U.S. at 27, 112 S.Ct. at 362 (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 2311 (1989)); see also *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 543 n.6, 106 S.Ct. 1326, 1332 n.6 (1986)(Actions of individual capacity defendants and official capacity defendants "are generally treated as the transactions of two different legal personages"); *Mongo Band of Mission Indians v. Calif. State Bd. of Equalization*, 858 F.2d 1376, 1382 n. 5 (9th Cir. 1988)(disregard the citizenship of individual board members in determining diversity jurisdiction under 28 U.S.C. § 1335), *cert. denied*, 488 U.S. 1006, 109 S.Ct. 787 (1989). Because the regents, when they acted as plaintiffs, could only be acting in their official capacities, they were not plaintiffs in their individual capacities and had not appeared as such in the original action. President Low was not a plaintiff in any capacity in the original state court action.

The authorities are divided as to whether Walker's claims can be "true" counterclaims. See *Pioche Mines Consol., Inc. v. Fidelity-Philadelphia Trust Co.*, 206 F.2d 336 (9th Cir. 1953), *cert. denied*, 346 U.S. 899, 74 S.Ct. 225 (1953); *Aldens, Inc. v. Packel*, 524 F.2d 38, 50-51 (3rd Cir. 1975); *Federal Deposit Insurance Corp. v. La Rambla Shopping Center, Inc.*, 791 F.2d 215, 220 (1st Cir. 1986); *Berger v. Reynolds Metals Co.*, 39 F.R.D. 313, 314-15 (E.D.Penn. 1966). See also Wright, Miller, Kane, 6 Federal Practice and Procedure § 1404 (West 1990). Nonetheless, except for the effort by the University, the regents and President Low to sever the original action against Walker from his counterclaim suit and to strike his pleading as untimely as per the state district court's scheduling order, no objection was made to the form of the

pleadings denoting some parties or claims as counter-claim or third-party in nature, and no objection as to process was made. The counter-claims meet jurisdictional requirements for permissive counterclaims. They "arise under" the Fourteenth Amendment. 28 U.S.C. § 1331; *Franchise Tax Bd. of the State of California v. Constr. Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 7-8, 103 S.Ct. 2841, 2845 (1983); *Gully v. First Nat. Bank in Meridian*, 299 U.S. 109, 97, 57 S.Ct. 96, 97 (1936).

Was Removal Proper?

Respondents removed this action pursuant to 28 U.S.C. § 1441(c). Section 1441(c) provides:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.[6]

Nothing in the language of § 1441(c) precludes a counter-defendant from removing the entire case. Although this Court has not addressed the ability of a counter-defendant to remove an action pursuant to the current § 1441(c), it has addressed the issue in a removal action by a counter-defendant based upon diversity jurisdiction pursuant to 28 U.S.C. § 71, a precursor to § 1441(c).

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[6]Section 1441(c) read as follows prior to the Judicial Improvements Act of 1990 [Pub. L. No. 101-650, 104 Stat. 5089]:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 61 S.Ct. 868 (1941). The *Shamrock Oil* Court noted that Congress, in drafting § 71, had amended the statute to add the language requiring removal by the "defendant or defendants" instead of by "either party". The Court further noted that it had already held under an earlier version of the statute that a "plaintiff, having submitted himself to the jurisdiction of the state court, was not entitled to avail himself of a right of removal conferred only on a defendant who has not submitted himself to the jurisdiction" of the state court. *Id.* at 106, 61 S.Ct. at 871 (citing *West v. Aurora City*, 6 Wall. 139, 18 L.Ed. 819 (1867)). The *Shamrock Oil* Court determined that it was the clear intent of Congress to limit removal under § 71 to the original defendant. *Id.* at 106-07, 61 S.Ct. at 871. Surely Congress was just as clear in their intent when they added the "defendant or defendants" language to § 1441(a) but deleted it from the current version of § 1441(c).

Walker's § 1983 claims are separate and independent of the original accounting and conversion action. In *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 71 S.Ct. 534 (1951), this Court addressed the issue of what constituted a "separate and independent" claim for purposes of § 1441(c). The Court determined that "where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c)". *Id.* at 14, 71 S.Ct. at 540. Walker appears to rely on *American Casualty* for the proposition that the "single wrong to him - he lost his tenured faculty position" cannot constitute the separate and independent claim necessary for § 1441(c). *American Casualty* found in pertinent part that:

> [i]n making this determination we look to the plaintiff's pleading, which controls . . . The single wrong for which relief is sought is the failure to pay compensation for the loss on the property. Liability lay among three parties, but it was uncertain which one was responsible. Therefore, all were joined as defendants in one petition.

Id. at 14, 71 S.Ct. at 540. *American Casualty* was not a counter-claim action; the Court's focus was on the single wrong to the party seeking relief, the original plaintiff. *American Casualty* does not support Walker's implicit contention that, in determining whether the claims are separate and independent, this Court should look to his complaint only and ignore the original action by the original plaintiff, UTHSC. The original wrong forming the basis of the initial state court suit was the alleged conversion of funds belonging to UTHSC. Walker then sued over his termination. Whether Walker's due process rights were violated is answered by reviewing the process he received, not the outcome of the process (his termination), nor a derivative result of the process (the litigation to recover the lost funds). *E.g.*, *Heller v. Doe*, 509 U.S. 312, 332, 113 S.Ct. 2637, 2649 (1993).

Whether a third-party claim was "separate and independent" was addressed by the Fifth Circuit in *Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury*, 622 F.2d 133 (5th Cir. 1980), in which the court made clear that the "a claim essentially seeking indemnity should be considered separate and independent" from the original complaint. *Id.* at 136. That is, the analysis was not artificially restricted to only the counter-plaintiff's complaint, but compared the original request for relief to the third-party indemnification requested relief.

This issue begins to resemble the one Walker presents in his petition: whether the federal claims in his counter-claim petition can be "joined" in the meaning of § 1441(c). Walker argues that only the original plaintiff can "join" a claim, and that only the original defendant can remove.[7] This argument, of course, elevates form over substance and has little authority in support.

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[7] *American Casualty* does state that "the plaintiff's pleading . . . controls" whether the multiple claims are separate and independent, 341 U.S. at 14, 71 S.Ct. at 540, but there was only one complaint in *American Casualty*.

FED.R.CIV.P. 13(h) permits the "joinder" of additional parties as defendants to counter-claims. Rule 13(h) has been construed liberally to further the consolidation of related litigation into one suit. *Gentry v. Smith*, 487 F.2d 571, 579-80 (5th Cir. 1973); *United Artists Corp. v. Masterpiece Productions, Inc.*, 221 F.2d 213, 217 (2nd Cir. 1955); *Lesnick v. Public Indus. Corp.*, 144 F.2d 968, 973 (C.C.A.2 N.Y. 1944); *Hercules Incorp. v. Dynamic Export Corp.*, 71 F.R.D. 101, 105-06 (S.D. N.Y. 1976); Wright, Miller, Kane § 1434. Counter-claims seek affirmative relief. They are subject to FED.R.CIV.P. 8, and subject to potential dismissal under FED.R.CIV.P. 12 and 56. Until the adoption of 28 U.S.C. § 1367, they required an independent basis for jurisdiction. *Iglesias v. Mutual Life Insurance Company of New York*, 156 F.3d 237, 241 (1st Cir. 1998); *Channell v. Citicorp. National Services, Inc.*, 89 F.3d 379, 384 (7th Cir. 1996); Wright, Miller, Kane § 1422.

The Fifth Circuit held that although counter-defendants who were the original plaintiffs could not remove an action because such rationale would violate the well-pleaded complaint rule, counter-defendants who were not original plaintiffs would not violate the rule. *State of Texas v. Walker*, 142 F.3, 813, 816 (5th Cir. 1998). The Fifth Circuit determined that President Low, added in both his capacities as a counter-defendant by Walker, could remove the entire case pursuant to the rationale of *Carl Heck Engineers v. Lafourche Parish Police Jury*, 622 F.2d 133 (5th Cir. 1980).[8] In *Carl Heck Engineers* the court of appeals found that there was diversity between the third-party plaintiff and third-party defendant, and that the third-party indemnification claim was sufficiently separate and independent, and thus the case was removable pursuant to § 1441(c). The *Carl Heck Engineers* court discussed the authority to the contrary, which they characterized as arguing either that the third-party claim was "merely incidental

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[8]The court of appeals assumed without deciding that the regents in their individual capacities were invalidated from removing because of their official capacity plaintiff status in the original action. 142 F.3d at 816.

or ancillary to the main claim and is not a separable controversy" or that it was "unjust" to allow a party the original plaintiff had not sued to determine the forum for the plaintiff's case. 622 F.2d at 135. The *Carl Heck Engineers* court determined that, as long as the third-party claim satisfied the separate and independent requirement of the statute and contained the basis for federal court jurisdiction, the action was removable. The Fifth Circuit in *State of Texas v. Walker* extended this logic to non-original plaintiffs such as President Low.[9]

Walker relies on *Thomas v. Shelton*, 740 F.2d 478 (7th Cir. 1984) and *Lewis v. Windsor Door*, 926 F.2d 729 (8th Cir. 1991), as well as the opinions of some commentators. Walker Petition at 5.

Thomas was originally a tort action in Indiana state court. Because the United States ultimately incurred the medical expenses at issue, it sued the defendant tortfeasor as well, in federal court, to recover its expenses. To avoid double liability, the defendant interpleaded the United States in the original state court action. The United States then removed the state court action to federal court and consolidated it with its own action against the defendant. The removing party in *Thomas* was a third-party defendant, unlike the case before the Court. Furthermore, unlike *Walker*, the third-party claims in *Thomas* were apparently state law tort claims, not federal questions. The *Thomas* court doubted that a third party defendant could ever remove under § 1441(c), because of the dependent nature of typical third-party claims means those claims are not "independent" and thus cannot be "joined" with the nonremovable claims of the original plaintiff.

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[9]Respondents would suggest to the Court that allowing original-plaintiff counter-defendants to remove would not violate the well-pleaded complaint rule. The well-pleaded complaint rule addresses the search for federal jurisdiction in the complaint and rules out establishing jurisdiction in the defendant's answer or in anticipated defenses. *E.g., Franchise Tax Bd.*, 463 U.S. at 9-10, 103 S.Ct. at 2846. Nothing in the well-pleaded complaint rule mandates that it's locus is required to be on the original plaintiff's complaint.

Thomas, 740 F.2d at 486.[10] Of course, the *Thomas* court's observation regarding the faulty separate and independent nature of third-party claims, even if true, is inapplicable to counter-claims, which are not as constrained to issues of indemnity as third-party claims are. The *Thomas* court's concern over proper "joinder" of claims is less clear, though it appears that the court felt § 1441(c) required (in some unexplained and limited way) that the third party-claims be joined with the nonremovable claim of the original plaintiff. *Id.* See also 1A Moore's Federal Practice ¶ 0.167[10] (2nd ed. 1979)(cited in *Carl Heck Engineers*, 622 F.2d at 135).

Another concern of the *Thomas* court was that allowing removal of an action "the main part of which" was outside the court's jurisdiction would "enlarge federal jurisdiction at the expense of state jurisdiction in a rather dramatic way." *Thomas*, 740 F.2d at 486. This federalism concern seems misplaced in *State of Texas v. Walker*, as the $88 million dollar constitutional counter-claims Walker brought against the regents and President Low dwarf the original $90,000 action UTHSC brought in state court. The Eighth Circuit has adopted the reasoning of *Thomas*. *Lewis v. Windsor Door Co.*, 926 F.2d 729 (8th Cir. 1991).[11]

Neither *Thomas* nor *Lewis* discuss the rationale that would explain why it is proper to deny the counter-defendants who were not original plaintiffs their choice of a federal forum to defend themselves. Nor do they satisfactorily explain why it is unfair to

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[10]The *Thomas* court acknowledges that the circuits and district courts are in conflict on the ability of third-party defendants to remove pursuant to § 1441(c). *Thomas*, 740 F.2d at 486 (citing *Ford Motor Credit Co. v. Aaron-Lincoln Mercury, Inc.*, 563 F.Supp. 1108, 1110 nn.6 & 8 (N.D. Ill. 1983) for a compilation of cases).

[11]At least one district court has applied *Thomas* to bar removal by counter-defendants. *Radio Shack Franchise Dept., A Division of Tandy Corp. v. Williams*, 804 F.Supp. 151 (D. Kan. 1992).

allow the original plaintiff to remove a federal question counter-claim.

Although it did not consider it, the *Franchise Tax Bd.* Court did note in passing the possibility of the argument at hand. The defendants below in *Franchise Tax Bd.* had filed a motion to dismiss in the district court, and suggested to the Court that it be considered as a counterclaim under the Employment Retirement Income Security Act of 1974 [28 U.S.C. §§ 1001 *et seq.*], and "which might then provide an independent jurisdictional basis for reaching the merits of the preemption issue in this case." *Franchise Tax Bd.*, 463 U.S. at 22 n.24, 103 S.Ct. at 2853 n.24 (citing *First Federal Savings and Loan Assoc. of Boston v. Greenwald*, 591 F.2d 417 (1st Cir. 1979), and *Wong v. Bacon*, 445 F.Supp. 1177, 1183-84 (N.D. Cal. 1977)).[12] There is no indication the Court accepted this invitation.

In summary, by treating Walker's § 1983 counter-claims as any other claim for relief in terms of removal jurisdiction under § 1441(c), federal courts would realize the "common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of causation . . . a selective process which picks the substantial causes out of the web and lays the other ones aside." *Franchise Tax Bd.*, 463 U.S. at 20-21, 103 S.Ct. 2852 (quoting *Gully*, 299 U.S. at 117-18, 57 S.Ct. 99-100)).

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[12]In *Greenwald*, the defendant removed claims against it brought under Massachusetts interest laws, arguing that its defense was primarily a question of federal law. The First Circuit, noting that the removal, pursuant to § 1441(b), may have been improvident under *Gully v. First National Bank*, 299 U.S. 109, 57 S.Ct. 96 (1936), observed nonetheless that subsequent to removal the defendants had filed a counterclaim pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, and that the district court "clearly had jurisdiction over the associations' separate declaratory judgment action". 591 F.2d at 423. In *Wong*, the district court found federal question jurisdiction based upon the defendants' counterclaims. However, the suit was commenced in federal district court, so no removal question presented itself.

Nothing in § 1441(c) precludes a counter-claim defendant from exercising his right to a federal forum to defend federal claims.

II. THE COURT OF APPEALS VIEWED THE DISPUTED EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE NON-MOVANT WHEN IT AFFIRMED THE DISTRICT COURT'S GRANT OF QUALIFIED IMMUNITY

Walker asserts that the court of appeals (and, implicitly, the district court) determined disputed questions of material fact in the light most favorable to the movant, in contradiction to the well known standards of this Court. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986); *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986). Walker provides this Court with no support for this conclusory allegation, which is contradicted by detailed factual determinations made by the district court. See Memorandum and Order of the District Court, State of Texas' Petition for Writ of Certiorari, Appendix at A27-A31.

Walker makes no contention in his Petition that the Fifth Circuit misapplied either qualified immunity law or substantive law. As public officials exercising discretionary functions, the regents and President Low are shielded from suit and from liability unless Walker can show that the constitutional rights the officials are accused of violating were clearly established at the time of the alleged offenses. *Harlow v. Fitzgerald*, 457 U.S. 800, 807, 102 S.Ct. 2727, 2732 (1982). The "touchstone" of this analysis is the objective reasonableness of the officials' conduct. *Anderson v. Creighton*, 483 U.S. 635, 637-41, 107 S.Ct. 3034, 3038-39 (1987). The current analytical framework for qualified immunity requires courts to determine, first, whether the plaintiff has a cognizable claim for deprivation of liberty or property interests without due process, and second, if so, whether that claim was clearly established under federal constitutional law in at the time. *Siegert*

v. Gilley, 500 U.S. 226, 231-233, 111 S.Ct. 1789, 1793-1794 (1991). So long as public officials of reasonable competence could differ on these issues, the defendants are immune from suit and liability. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096 (1986).[13]

It was undisputed that UTHSC determined that he owed the MSRDP $98,350, which was the most of all the faculty found to be in violation of the MSRDP agreement. See Memorandum and Order of the District Court, State of Texas' Petition for Writ of Certiorari, Appendix at A27-A31. It was undisputed that the other faculty cooperated with UTHSC and paid sizeable amounts to the MSRDP almost immediately. *Id.* It was undisputed that Walker was the only one who retained counsel and engaged in contentious negotiations with President Low. *Id.* It was undisputed that, even after negotiations, Walker only offered to pay $5,000 of the $98,350 estimate. *Id.* It was also undisputed that Walker was the only faculty member who resisted supplying UTHSC with an accounting of his earnings. *Id.*

Walker's Substantive Due Process Claims

Walker argues that the Fifth Circuit inappropriately resolved disputed facts regarding his substantive due process claims. Walker complains that the regents and President Low acted in an arbitrarily manner when they terminated him from his tenured faculty position at UTHSC, in violation of the Fourteenth Amendment's protection from arbitrary and capricious state action. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 220-23, 106 S.Ct. 507, 511-12 (1985). However, as detailed *supra*, the regents had plenty of evidence before them that would allow them to exercise their discretion and still apply professional and

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[13]This Court's recent *Crawford-El v. Britton* decision is not applicable to the qualified immunity analysis of the substantive due process and rational basis equal protection claims in this case. _U.S. _, 118 S.Ct. 1584 (1998).

reasoned judgment. Most facts were not in dispute. Walker's argument is that his "offer" to settle, his "defense" that his bankruptcy erased most of his obligations to the MSRDP, and his "defense" that his subsequent licensing as an attorney shielded his professional earnings somehow created a question of material fact. The regents, however, were addressing the relatively undisputed situation that Walker alone was not forthcoming with information nor a reasonable remittance. As the court of appeals determined, Walker's "defenses" were not clearly established, and reasonable regents sitting in judgment could disagree as to their application to Walker's situation. The regents were not required by FED.R.CIV.P. 56 to show that there were no disputed issues before them when they considered Walker's termination.

Walker also claims that the mere fact that an administrative hearing tribunal at UTHSC had found in his favor created a fact question that the regents acted arbitrarily when they proceeded to terminate him nonetheless. UTHSC rejected the hearing tribunal's recommendation and put Walker's termination on the agenda of the board of regents. Memorandum and Order of the District Court, State of Texas' Petition for Writ of Certiorari, Appendix at A31. The regents held a hearing, heard from both Walker and the university, and, exercising their discretion, chose to agree with the institution and terminated Walker. As long as Walker received the process due under the Constitution, the clearly established law in the Fifth Circuit that it is not actionable to cite any deviation by the Board of Regents from the System's own rules and regulations. *Levitt v. University of Texas at El Paso*, 759 F.2d 1224, 1230-31 (5th Cir. 1985), *cert. denied*, 474 U.S. 1034, 106 S.Ct. 599 (1985). Moreover, it is not *per se* a violation of the Due Process Clause for the Regents to reject the findings and recommendations of an advisory hearing tribunal. *Kersey v. Shipley*, 673 F.2d 730, 733 (4th Cir. 1982), *cert. denied*, 459 U.S. 836, 103 S.Ct. 80 (1982); *Weiss v. Anker*, 421 F.Supp. 1040 (E.D.N.Y. 1976). Given the facts that were undisputed, *supra*, Walker presents this Court with no reason to disturb the Fifth

Circuit's determination that Walker's case presented the regents with a fact pattern that reasonable officials could disagree, and thus qualified immunity was proper. *State of Texas v. Walker*, 142 F.3d at 819 (citing *Malley*, 475 U.S. at 341, 106 S.Ct. at 1096).

Walker also complained that the regents' rejection of his discharge in bankruptcy defenses must be arbitrary behavior. *State of Texas v. Walker*, 142 F.3d at 819 n. 6. Walker never listed the State or UTHSC as a creditor in his bankruptcy, and the State never participated in his proceeding. UTHSC then filed the original action in state court for conversion and breach of contract, and Walker asserted his affirmative defense that whatever he owed UTHSC had been discharged in bankruptcy. *State of Texas v. Walker*, 142 F.3d at 820. UTHSC argued that his claims were non-dischargeable under 11 U.S.C. § 523. The district court granted Walker's motion for summary judgment on this issue.

The Fifth Circuit held that, as the nature of the law regarding his discharge claims was not clearly established, the UTHSC officials were entitled to qualified immunity. The court of appeals noted that "because the state was never notified of the bankruptcy and never had the opportunity to file a timely claim, bankruptcy law should ordinarily expressly protect the state's claim from being discharged." *Id.* at 822 & n.16. Once the court of appeals determined that the Eleventh Amendment did not prohibit the bankruptcy court from discharging a debt owed the state, the discharge could be raised by Walker as a defense to UTHSC's original state court action for conversion and breach of contract. *Id.* at 820. The court determined that a fact question existed as to whether Walker had engaged in "willful and malicious injury" as defined by 11 U.S.C. § 523(a)(6). Walker does not appeal this determination. The court of appeals also found that the state of the law was sufficiently unclear regarding these defenses that a reasonable official could have concluded that his obligations had not been discharged. *State of Texas v. Walker*, 142 F.3d at 819 n.6. The court of appeals addressed this issue extensively, *Id.* at

823-24, and Walker does not brief this Court as to why the court of appeals erred.

Walker's Equal Protection Claims

Finally, Walker complains that the court of appeals improperly determined fact questions in the movants' favor regarding his Equal Protection claims. Walker's Petition at 9. Specifically, Walker argues that the court of appeals (and, implicitly, the district court) decided disputed questions of material facts regarding whether he was similarly situated with other faculty at UTHSC.[14] *Id.* The district court determined, and it is undisputed, that Walker is not a member of any protected class. Memorandum and Order of the District Court, State of Texas' Petition for Writ of Certiorari, Appendix at A38 n.32. The district court dismissed this claim on that basis, citing *Woods v. Johnson*, 75 F.3d 1017, 1036 (5th Cir. 1996), *cert. denied*, _ U.S. _, 117 S.Ct. 150 (1996); and *Green v. McKaskle*, 788 F.2d 1116, 1125 (5th Cir. 1986). The Fifth Circuit affirmed, but on different grounds, determining that the rational basis test was appropriate for Walker's equal protection claims. *State of Texas v. Walker*, 142 F.3d at 819 (citing *Johnson v. Rodriguez*, 110 F.3d 299, 306 (5th Cir. 1997)). Based upon the undisputed facts before the district court, Walker was so far removed from the other colleagues who were found to be in violation of the MSRDP that he was simply not similarly situated. It was not difficult to show that the regents and President Low acted in an objectively reasonable manner when they undertook to terminate Walker, and the district court and the court of appeals properly found them to be entitled to qualified immunity for this claim.

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[14]It is undisputed that he was the only medical school faculty member terminated at that time for failure to reimburse UTHSC for monies withheld from the MSRDP.

CONCLUSION

Removal of federal question counter-claims by counter-defendants was proper in this case. The court of appeals did not inappropriately resolved disputed issues of material fact. Walker's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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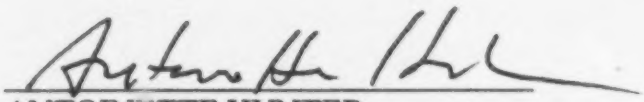

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APPENDIX

TEXAS RULES OF CIVIL PROCEDURE

RULE 97. COUNTERCLAIM AND CROSS-CLAIM

(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party whether or not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(f) Additional Parties. Persons other than those made parties to the original action may be made parties to a third party action, counterclaim or cross-claim in accordance with the provisions of Rules 38, 39 and 40.

RULE 38. THIRD-PARTY PRACTICE

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a citation and petition to be served upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party petition not later than thirty (30) days after he serves his original answer. Otherwise, he must obtain leave on motion upon notice to all parties to the action. The person served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim under the rules applicable to the defendant, and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 97. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the

plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses and his counterclaims and cross-claims. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or who may be liable to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant.

(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) This rule shall not be applied, in tort cases, so as to permit the joinder of a liability or indemnity insurance company, unless such company is by statute or contract liable to the person injured or damaged.

(d) This rule shall not be applied so as to violate any venue statute, as venue would exist absent this rule.

RULE 39. JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) Persons to Be Joined if Feasible. A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (I) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring

double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 42.

RULE 40. PERMISSIVE JOINDER OF PARTIES

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the

action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all other relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

UNITED STATES CODE ANNOTATED
TITLE 11 BANKRUPTCY

§ 523. EXCEPTIONS TO DISCHARGE

(a) A discharge under section 717, 1141,, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit --

(A) If such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a

proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity.